

No. 14667.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy, of the Estate of
NED WHITEHEAD, doing business as NED WHITEHEAD
& Co., Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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A. A. GOLDSTONE.

756 South Broadway,
Los Angeles 14, California,

Attorney for Ruth Whitehead, Appellant.

PAUL P. O'BRIEN, CLERK

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Facts.

The Appellant, Ruth Whitehead, is the former wife of the above-named bankrupt, Ned Whitehead and also a creditor of Ned Whitehead. She has a judgment against Ned Whitehead for her support as well as a judgment for the support of Wendy Gay Whitehead, minor child of the parties and now twelve years of age. [Tr. of Rec. pp. 3-4.]

Ned Whitehead, the above-named bankrupt, has been permitted to draw substantial sums out of the estate herein, that is, he was permitted to draw salary [Tr. of Rec. p. 12, par. 8] and also to draw \$1,000.00 plus actual transportation costs and \$500.00 per month subsistence allowance while in Puerto Rico [Tr. of Rec. p. 13(a) and (b)], in the guise of travel and entertainment expenses and subsistence, but from July 15, 1952, to the present

time, he has not paid anything whatsoever for the support of Appellant, Ruth Whitehead, or for the support of the minor child of the parties, Wendy Gay Whitehead.

On or about October 8, 1953, an order was made in the above-entitled matter by Referee Reuben G. Hunt, permitting Appellant to levy execution or garnishment upon all of the assets of said bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, Trustee in the above-entitled matter, provided, however, that the assets be first applied to payment and satisfaction of the allowed claims of creditors and costs of administration, and the surplus of said assets in excess of the approved and allowed claims of creditors and expenses of administration be applied to the sum due Appellant, which was then \$6,000.00 [Tr. of Rec. pp. 5-6]; that said execution or garnishment was thereupon duly and regularly levied upon the Trustee, and at the time of such levy there was in the possession of the Trustee corporate stock of Ned Whitehead in the company which is wholly owned and controlled by him. [Tr. of Rec. p. 7, par. II.]

The Trustee entered into a contract to sell back to Ned Whitehead the 378 shares of stock of Whitehead and Co., together with a few miscellaneous items of personal properties for \$13,500.00, that is, all the remaining assets in possession of the Trustee except accounts receivable and cash in the possession of the Trustee [Tr. of Rec. pp. 8-18]. The Referee made his order confirming the sale to Whitehead as requested [Tr. of Rec. pp. 18-19]. Under this arrangement the stock was sold back to Whitehead and he pledged it to the Trustee as security for payment of the \$13,500.00, payable at the rate of \$750.00 per month with interest at 6 percent on installments not paid when due. [Tr. of Rec. pp. 9-10.]

However, Ned Whitehead was in the process of making a deal whereby he could get back his stock for only \$6,000.00, instead of the sum he had agreed to pay. [Petition to Compromise, Tr. of Rec. pp. 19-22.]

A petition for order to show cause *re* release of writ of execution was filed by the Trustee and joined in by Ned Whitehead through his attorneys, Grainger, Carver & Grainger. The petition, as appellant is informed and believes, was prepared for the Trustee, who presumably represents the creditors, by Grainger, Carver & Grainger, the attorneys for Ned Whitehead. [Tr. of Rec. pp. 22-24.]

At the hearing before the Referee, it was claimed that Appellant was interfering with the administration of the estate herein because her execution on the stock prevented turning it over to Ned Whitehead for \$6,000.00. Appellant, however, through her counsel, informed the Referee that the stock could be sold to anyone, including Ned Whitehead, without objection by Appellant, but that if the stock were sold to Whitehead, it should thereafter be delivered to the Sheriff of Los Angeles County, under the execution. Counsel for both the Trustee and for Whitehead then stated that Ned Whitehead was the only buyer of the stock and that unless sale thereof could be made to him at his price, administration of the estate was being interfered with, and that Whitehead would not buy the stock unless it was delivered to him. The Referee thereupon held that the execution was annulled. [Tr. of Rec. pp. 26-28.] The stock was never offered for sale at public sale.

The District Court sustained the Referee with the statement that Appellant and Wendy Gay Whitehead were "disappointed creditors" because there would be no pay-

ment of any kind to general creditors, including Appellant and Wendy.

This appeal followed.

I.

The Order Made by Referee Reuben G. Hunt Permitting the Levy of Execution or Garnishment Was Valid.

In *Bankers' Mortg. Co. of Topeka, Kansas, et al. v. McComb, et al.*, 60 F. 2d 218, it was held as follows:

“It is a general rule that, where a person's possession or control of property constitutes custodia legis, he cannot be subjected to garnishment process in respect of such property (citing among other cases—*In re Argonaut Shoe Co.* (C. C. A. 9), 187 F. 784).

“The reason for the rule is that to require such a person to respond in garnishment would result in an interruption of the orderly progress of judicial proceedings and in an invasion of the jurisdiction of the court which has legal custody of such property. (Citing cases, including *In re Argonaut Shoe Co.*, *supra*).

“Such a person, with the consent of the court having custody of such property may be held as garnishee after the purposes of the law's custody have been accomplished and such court has by order directed delivery thereof to the garnishee-debtor. Under such circumstances, garnishment will not interrupt the progress of judicial proceedings in such court nor invade its jurisdiction. The officer holds the property not for the law but for the persons entitled thereto; and the reason for the rule no longer exists. (Citing cases).” (Emphasis ours.)

II.

The Order Made by Referee Dickson Was Improper and Not a Valid Exercise of Discretion and the United States District Court Erred in Sustaining Such Order.

In the instant case, there was no interference by Appellant, Ruth Whitehead, with respect to sale of the stock to anyone, including Ned Whitehead, and as stated in *Bankers' Mortg. Co. of Topeka, Kansas, et al. v. McComb, et al., supra*, the reason for the rule against execution or garnishment herein does not exist.

The order of Referee Dickson which vacated the prior order of Referee Hunt permitting levy of execution or garnishment and which ordered the writ of execution annulled is therefore improper and invalid, or if he had any discretion in the matter, such order by Referee Dickson was an abuse of discretion, and the order of the United States District Court on review of the referee's order of August 16, 1954, is erroneous and should be reversed.

Respectfully submitted,

A. A. GOLDSTONE,

Attorney for Ruth Whitehead, Appellant.

